



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 19 2018

REPLY TO THE ATTENTION OF

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Nick Piccolo
Orion Diesel LLC
2956 Frembes Road
Waterford, Michigan 48329

Re: Finding of Violation for Clean Air Act Violations

Dear Mr. Piccolo:

The U.S. Environmental Protection Agency is issuing the enclosed Finding of Violation (FOV) to Orion Diesel LLC (Orion Diesel or you) for violating the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, and its implementing regulations. As summarized in the attached FOV, EPA has determined that Orion Diesel has manufactured, sold, offered to sell, and/or installed parts or components that bypass, defeat, or render inoperative elements of design of those engines that were installed by the original equipment manufacturer in order to comply with CAA emission standards. Therefore, Orion Diesel violated Sections 203(a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(3)(B).

We are offering you an opportunity to confer with us about the violations alleged in the FOV. The conference will give you an opportunity to present information on the specific findings of violation, any efforts you have taken to comply, and the steps you will take to prevent future violations. In addition, in order to make the conference more productive, we encourage you to submit to us any information responsive to the FOV prior to the conference date.

Please plan for your facility's technical and management personnel to attend the conference to discuss compliance measures and commitments. You may have an attorney represent you at this conference.

The EPA contact in this matter is Ethan Chatfield. You may call him at (312) 886-5112 to request a conference. You should make the request within 10 calendar days following receipt of this letter. We should hold any conference within 30 calendar days following receipt of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward Nam", with a stylized flourish at the end.

Edward Nam
Director
Air and Radiation Division

Enclosure

cc: Steven Chester, Miller, Canfield, Paddock, and Stone PLC

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

Orion Diesel LLC
Waterford, Michigan

Proceedings Pursuant to
The Clean Air Act,
42 U.S.C. §§ 7401–7671q

FINDING OF VIOLATION

EPA-5-19-MI-02

FINDING OF VIOLATION

The U.S. Environmental Protection Agency (EPA) is issuing this Finding of Violation to Orion Diesel LLC (Orion Diesel) for violating the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, and its implementing regulations.

Statutory and Regulatory Background

1. Title II of the CAA was enacted to reduce air pollution from mobile sources. In enacting the CAA, Congress found, in part, that “the increasing use of motor vehicles...has resulted in mounting dangers to the public health and welfare.” CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2). Congress’s purpose in enacting the CAA included “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,” and “to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution.” CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2).
2. EPA promulgated emission standards for particulate matter (PM), nitrogen oxides (NO_x), and other pollutants applicable to motor vehicles and motor vehicle engines, under Section 202 of the CAA, 42 U.S.C. § 7521. *See generally* 40 C.F.R. Part 86.
3. EPA promulgated regulations that require every new motor vehicle or new motor vehicle engine manufactured for sale, sold, offered for sale, introduced, or delivered for introduction to commerce, or imported into the United States for sale or resale, which is subject to the emission standards prescribed under Section 202, 42 U.S.C. § 7521 (40 C.F.R. Part 86), be covered by a certificate of conformity. *See* 54 Fed. Reg. 14460, April 11, 1989 and amendments.
4. Motor vehicle and motor vehicle engine manufacturers employ many devices and elements of design to meet emission standards. *Element of design* means “any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine.” *See* 40 C.F.R. § 86.094-2 and 86.1803-01.

5. To meet the emission standards in 40 C.F.R. Part 86, and qualify for a certificate of conformity, diesel-powered motor vehicle and motor vehicle engine manufacturers may utilize control devices or elements of design such as Diesel Particulate Filter (DPF), Exhaust Gas Recirculation (EGR), Diesel Oxidation Catalyst (DOC) and/or Selective Catalytic Reduction (SCR) systems.
6. Diesel-powered motor vehicle and motor vehicle engine manufacturers may also employ retarded fuel injection timing as a primary element of design to limit emissions of oxides of nitrogen (“NOx”). *See* 59 Fed. Reg. 23,264 at 23,418 (May 5, 1994) (“[I]njection timing has a very significant impact on NOx emission rates, with advanced timing settings being associated with higher NOx...”).
7. Modern motor vehicles and engines are equipped with electronic control modules (“ECMs”). ECMs continuously monitor engine and other operating parameters and control the emission control devices and elements of design, such as the DPF, EGR, SCR systems and the engine fueling strategy.
8. Under section 202(m) of the CAA, 42 U.S.C. § 7521(m), the EPA promulgated regulations for motor vehicles manufactured after 2007 that require motor vehicles to have numerous devices or elements of design that, working together, can detect problems with the vehicle’s emission-related systems, alert drivers to these problems, and store electronically-generated malfunction information. 40 C.F.R. §§ 86.005-17, 86.007-17, 86.1806-05. These devices or elements of design are referred to as “onboard diagnostic systems” or “OBD” systems.
9. Section 203(a)(3)(B) of the CAA makes it unlawful for “any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use.”
10. Section 216(2) of the CAA defines “Motor vehicle” as “any self-propelled vehicle designed for transporting persons or property on a street or highway.” *See also* 40 C.F.R. § 85.1703 (further defining “motor vehicle”).

Facility Background

11. Orion Diesel is an aftermarket automotive parts supplier located in Waterford, Michigan.
12. Orion Diesel is a person, as that term is defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).
13. On September 18, 2018, EPA issued a CAA Section 208 Information Request to Orion Diesel.

14. On November 28, 2018, Orion Diesel responded to EPA's Information Request. In the response, Orion Diesel provided information showing that between January 1, 2016, and September 20, 2018, the company sold at least 12,023 parts or components where a principal effect of each part or component was to disable, remove, bypass, defeat, or render inoperative air pollution emission control systems installed on or in diesel-powered motor vehicles and motor vehicle engines in compliance with Title II of the CAA. More specifically, Orion Diesel sold, offered for sale, and installed parts and components that removed, disconnected, bypassed or disabled the engine fueling strategy, DOCs, DPFs, EGRs, OBDs and/or SCR systems, and/or tampered with the emissions-related elements of the electronic control module (ECM).
15. In Orion Diesel's November 28, 2018 response to EPA's Information Request, the company asserts that the Request seeks information on parts and/or components that are for "off-road or competition race use only" and that customers purchasing such parts must agree to Orion Diesel's specified Terms and Conditions/Liability Waiver.
16. EPA finds that the parts and components sold and offered for sale by Orion Diesel are intended for "motor vehicles" as defined by Section 216(2) of the CAA. As a legal matter, there is no "off-road use only" or "competition only" exemption under the CAA for motor vehicles or motor vehicle engines. "Motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." CAA § 216(2); 42 U.S.C. § 7550(2); *See also* 40 C.F.R. § 85.1703 (further defining "motor vehicle"). These definitions make no exemption for motor vehicles or motor vehicle engines used for competition.¹ More generally, these definitions are based on vehicle attributes (*e.g.*, ability to travel over 25 miles per hour, lack of features that render street use unsafe) and make no exemption for vehicles based on their use.
17. The EPA has consistently adhered to the plain language definition of "motor vehicle." *See, e.g.*:
 - a. 39 Fed. Reg. 32,609 (Sept. 10, 1974) (EPA rejecting proposal to exempt from the definition of "motor vehicle" certain vehicles "based solely on the intended use by the purchaser" because "[t]he Agency views a policy of exclusion based upon owner intent to be virtually unmanageable and inconsistent with the Act because vehicles with on-road, off-road capabilities are typically operated in both situations");
 - b. EPA, *Fact Sheet: Exhaust System Repair Guidelines* (Mar. 13, 1991) (explaining that "it is not legal for anyone to 'de-certify' a motor vehicle for 'off-road' use," and that it is not legal to bypass, defeat, or render inoperative a motor vehicle emission control system as that system was designed by the manufacturer, even where that system was already defeated);
 - c. EPA fact sheet describing settlement of *United States v. Casper's Electronics, Inc.*, Civ. No. 1:06-cv-03542 (N. D. Ill.) (July 10, 2007),

¹ In contrast, the CAA exempts from the definition of "nonroad vehicle" and "nonroad engine" those vehicles and engines used solely for competition. CAA § 216(10)-(11); 42 U.S.C. § 7550(10)-(11). EPA has implemented regulations describing how to exempt from CAA requirements nonroad vehicles and engines used solely for competition. 40 C.F.R. § 1068.235. These regulations explicitly do not apply to motor vehicles and motor vehicle engines. 40 C.F.R. § 85.1701(a)(1).

<http://www2.epa.gov/enforcement/caspers-electronics-inc-clean-air-act> (last visited July 5, 2018) (“These [defeat] devices were advertised for ‘off road use only’ or ‘non-road use only.’ However, the O₂ Sims were designed and marketed to be used in regular production vehicles (‘on road or ‘on highway’ vehicles), which is illegal under the Clean Air Act.”); and

- d. EPA Presentation at November 2010 Specialty Equipment Market Association Show, *Diesel Aftermarket Parts Discussion* (“Question 1: Am I protected from selling a defeat device or tampering as long as I inform my customers that they can only use my parts ‘off-road’ or ‘for racing use only’ or that the parts are ‘not for installation on emission-controlled vehicles’? Answer: No, if the parts are designed for and intended to be installed on certified motor vehicles, EPA considers you to still be liable under the CAA prohibited acts.”).

Violations

18. EPA finds that Orion Diesel is in violation of Section 203(a)(3)(B) of the CAA by selling, offering to sell, and/or installing parts and/or components where a principal effect of the part or component was to bypass, defeat or render inoperative the engine fueling strategy, DPF, EGR, OBD and SCR systems and tampering with the emission-related elements of the ECM installed on thousands of motor vehicles.
19. EPA further finds that Orion Diesel knew or should have known that such parts and/or components were being used by its customers to bypass, defeat or render inoperative the emission controls on motor vehicles certified under the CAA.

Environmental Impact of Violations

20. These violations have resulted in excess emissions of PM, NO_x, hydrocarbons, and other air pollutants.
 - PM: Especially fine particulates containing microscopic solids or liquid droplets, which can get deep into the lungs and cause serious health problems. PM exposure contributes to:
 - irritation of the airways, coughing, and difficulty breathing;
 - decreased lung function;
 - aggravated asthma;
 - chronic bronchitis;
 - irregular heartbeat;
 - nonfatal heart attacks; and
 - premature death in people with heart or lung disease.
 - NO_x: Current scientific evidence links short-term NO_x exposures, ranging from 30 minutes to 24 hours, with adverse respiratory effects including airway inflammation in healthy people and increased respiratory symptoms in people with asthma. In addition, studies show a connection between breathing elevated short-term NO_x concentrations and increased hospital admissions for respiratory issues, especially asthma.

Enforcement Authority

21. The EPA may bring an enforcement action for these violations under its administrative authority or by referring this matter to the United States Department of Justice with a recommendation that a civil complaint be filed in federal district court. CAA §§ 204 and 205, 42 U.S.C. §§ 7523 and 7524. Persons violating Section 203(a)(3) of the CAA, 42 U.S.C. § 7522(a)(3), are subject to an injunction under Section 204 of the CAA, 42 U.S.C. § 7523, and a civil penalty of up to \$4,619 for each violation. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.

Date

12/18/18



Edward Nam
Director
Air and Radiation Division

CERTIFICATE OF MAILING

I certify that I sent a Finding of Violation, No. EPA-5-19-MI-02, by Certified Mail, Return Receipt Requested, to:

Nick Piccolo
Orion Diesel
2956 Frembes Road
Waterford, Michigan 48329

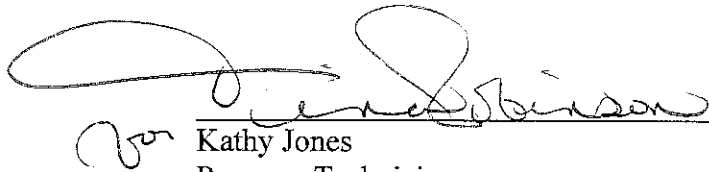
I also certify that I sent a Finding of Violation, by e-mail to:

Jenine Camilleri
Enforcement Unit Supervisor
Air Quality Division
Michigan Department of Environmental Quality
CamilleriJ@michigan.gov

Joyce Zhu (Acting District Supervisor)
Southeast Michigan District Office
Michigan Department of Environmental Quality
Zhuj@michigan.gov

Steven E. Chester, Attorney
Miller, Canfield, Paddock, and Stone P.L.C.
Chester@millercanfield.com

On the 20th day of December, 2018.


Kathy Jones
Program Technician
AECAB, PAS

CERTIFIED MAIL RECEIPT NUMBER: 701706600000316618380